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 Case No. 4:11-cv-06714-YGR*

*Interim Lead Class Counsel in Cameron, et. al
 v. Apple Inc., Case No. 4:19-cv-03074-YGR*

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

EPIC GAMES, INC.,
 Plaintiff, Counter-defendant,
 v.
 APPLE INC.,
 Defendant, Counterclaimant.

Case No. 4:20-cv-05640-YGR-TSH
**CLASS PLAINTIFFS' ADMINISTRATIVE
 MOTION FOR PERMISSION TO VIEW
 TRIAL VIA ZOOM**

IN RE APPLE IPHONE ANTITRUST
 LITIGATION

No. 4:11-cv-06714-YGR

DONALD R. CAMERON, et al.,
 Plaintiffs,
 v.
 APPLE INC.
 Defendant.

No. 4:19-cv-03074-YGR

1 **I. INTRODUCTION**

2 Pursuant to Civil Local Rule 7-11, plaintiffs in the related case *In re Apple iPhone Antitrust*
 3 *Litigation*, No. 4:11-cv-06714-YGR (the “Consumer action” and “Consumer Plaintiffs”) and plaintiffs
 4 in the related case *Cameron, et al. v. Apple Inc.*, No. 4:19-cv-03074-YGR (the “Developer action” and
 5 “Developer Plaintiffs,” and, collectively, “Class Plaintiffs”) request the Court’s permission for their
 6 counsel to view the bench trial in *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR-TSH,
 7 scheduled to commence on May 3, 2021, live over the Zoom platform. Under normal circumstances,
 8 Class Plaintiffs would be able to attend the trial in person. However, given the COVID-19 pandemic
 9 and the consequent restrictions put into place, the Court is permitting only six people to attend in
 10 person for Epic Games, Inc. and six people to attend in person for Apple Inc. The remainder of the
 11 parties’ trial teams, and perhaps some witnesses, will be viewing or participating in the trial over Zoom,
 12 and Class Plaintiffs seek permission to also view the trial over Zoom.

13 Class Plaintiffs attempted to seek agreement from the parties regarding this reasonable request.
 14 While Epic has no objection, Apple is not in agreement and has made the untenable argument that
 15 Class Plaintiffs are members of the public and should therefore be limited to listening to the audio
 16 version of the trial. Apple’s position is meritless and can only be an attempt to gain an advantage over
 17 Class Plaintiffs, since it will have full access to the trial, including the ability to observe the witnesses’
 18 demeanor and weigh their credibility. Class Plaintiffs should have the same access. Moreover, Class
 19 Plaintiffs have an interest in the *Epic* trial proceedings, and not just the outcome, because many of the
 20 witnesses and much of the evidence will be the same as that introduced in Class Plaintiffs’ trials.
 21 Therefore, observing witness testimony and other trial proceedings will help inform Class Plaintiffs as
 22 to whether they should seek to weigh in on any aspect of the trial that could adversely impact their
 23 clients’ and the classes’ interests.

24 Consumer Plaintiffs filed the first of these three related cases in 2011, eight years before either
 25 of the other two related cases were filed, and diligently litigated their case in this Court, the Ninth
 26 Circuit Court of Appeals, and the U.S. Supreme Court. Since late 2019, discovery in the three cases
 27 has been coordinated, including voluminous document and data discovery and the taking of numerous
 28 depositions. The parties in all three cases have participated in several joint Zoom hearings including

1 case management conferences and discovery hearings. Class Plaintiffs’ motions for class certification
 2 are due on June 1, 2021, and the testimony and evidence admitted at the *Epic* trial will be highly
 3 relevant to those motions and also to the merits phases of their respective cases. Therefore, Class
 4 Plaintiffs are not similarly situated to the public at large and should be permitted to view the trial over
 5 Zoom so they will not be at a disadvantage to Apple, whose litigation teams in all three matters will
 6 be observing the trial both live and remotely.

7 **II. RELEVANT BACKGROUND**

8 On December 29, 2011, Consumers Plaintiffs initiated the first of these related actions with the
 9 filing of their Class Action Complaint alleging violations of Section 2 of the Sherman Antitrust Act of
 10 1890, 15 U.S.C. § 2, for monopolization and attempted monopolization of the aftermarket for iPhone
 11 applications. Consumers ECF No. 1.

12 After several rounds of motions to dismiss and amendment of the pleadings, on December 2,
 13 2013, the Court granted Apple’s motion to dismiss Consumer Plaintiffs’ second amended consolidated
 14 complaint with prejudice. Consumers ECF No. 124. Plaintiffs subsequently appealed the dismissal
 15 and the Ninth Circuit reversed. Apple appealed the Ninth Circuit’s reversal and the U.S. Supreme Court
 16 affirmed the Ninth Circuit on May 13, 2019. *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

17 After Consumer Plaintiffs prevailed in the U.S. Supreme Court, Developers filed their Class
 18 Action Complaints in *Cameron, et al. v. Apple Inc.*, No. 19-cv-03074, on June 4, 2019, and in *Sermons*
 19 *v. Apple Inc.*, No. 19-cv-03796 on June 28, 2019. Developers ECF No. 1. On August 22, 2019, the
 20 Court related the two Developer actions to the Consumer action, finding that “each case stems from the
 21 use of the exact same technology and the economics regarding that same technology,” and that “the
 22 individual transactions addressed by each case . . . are underlined by the same operative facts—Apple’s
 23 alleged monopolization of the distribution and sale of iPhone apps.” Consumers ECF No. 168 at 2-3.
 24 The Court held a case management conference in all of the Consumer and Developer cases on
 25 September 13, 2019, and the *Sermons* and *Cameron* plaintiffs filed a Consolidated Class Action
 26 Complaint on September 30, 2019. Developers ECF No. 53. On January 6, 2020, the Court entered an
 27 Order Granting Stipulation Regarding Coordination of Discovery in the Consumer and Developer
 28

actions, Consumers ECF No. 194, and Consumers and Developers have coordinated their discovery efforts thereafter.

On August 13, 2020, Epic Games, Inc. filed a Complaint for Injunctive Relief against Apple. ECF No. 1. On August 19, 2020, the Court related the *Epic* case to the Developer action. ECF No. 24. The plaintiffs in the Consumer, Developer, and *Epic* actions thereafter coordinated their discovery efforts, including the taking of numerous depositions. On October 6, 2020, the Court set a trial date of May 3, 2021 in the *Epic* action. ECF No. 115.

At the March 1, 2021 Further Case Management Conference in the *Epic* case, the Court discussed the logistics of conducting the *Epic* trial in the midst of the COVID-19 pandemic, and allowing Court staff, and Epic and Apple trial teams to view the trial via Zoom while the general public listens to the trial over a conference line:

[S]o the May 3rd date is confirmed. . . . worst case scenario it's a full bench trial by Zoom

* * *

Under all circumstances we will be using Zoom because we still have people who need to be participating remotely, whether it's Court staff. And I think it also helps for purposes of document management.

I expect there will be at least, you know, one person who can't testify because of health concerns, so I want to make sure that we have all of the technology in place.

* * *

While Zoom has allowed us to provide access over and beyond what we have ever done, we're doing this by video and everybody can see the video who wants to see it. Looks like we've got, you know, 65 people watching in addition to participating. I cannot and, in fact, am not allowed to do that by the Administrative Office of the Courts for purposes of evidentiary hearings, including trials.

So everybody understands that ***public*** access will be audio only. All right? And perhaps the U.S. Courts will change their mind over time, but right now that's the only option that's available.

Mar. 1, 2021 Hrg. Tr. at 11:22-12:1; 14:25-15:6; 15:22-16:7 (emphasis added).¹

¹ At the March 26, 2021 Pretrial Conference, Epic's counsel asked if the Court would allow them to have "walk-around mics that would clip onto the lapel and actually boost the sound." The Court responded, "Absolutely," and that "[h]ow that works with Zoom, I don't know. I don't know that I've tested that. So we'll probably have to test it." Mar. 26, 2021 Hr. Tr. at 9:4-5, 7, 14-15.

On March 2, 2021, the Court entered Pretrial Order No. 1 in the *Epic* case that held, in relevant part: “Given the ongoing COVID-19 pandemic, the precise format of the bench trial remains uncertain. At a minimum, the bench trial shall proceed by way of Zoom platform. *Public* access shall be by way of telephone access; video access is not an option for evidentiary proceedings including trials.” ECF No. 371 at 1, ¶ 1 (emphasis added); *see also id.*, at 2, ¶ 3 (“Under all circumstances, the bench trial will include a Zoom component. To facilitate the Zoom-aspect of the bench trial, the parties shall investigate the joint use of a third-party trial vendor to manage pretrial preparations of witnesses, witness participation, document management, and unlimited telephone access.”).

Since the *Epic* trial is clearly going to involve a Zoom component, Class Plaintiffs reached out to Epic’s counsel and Apple’s counsel on April 2, 2021, and expressed a desire to have several members of each of their teams observe the *Epic* trial via Zoom. Class Plaintiffs proposed contacting the Courtroom Deputy, and copying Epic’s and Apple’s counsel, to inquire about how best to request access. Epic’s counsel responded that Epic has no objection to Class Plaintiffs’ request and that it made sense to clear the request with the Court. Epic suggested that once the parties select a vendor to operate some of the electronic logistics of the trial, that vendor may be able to facilitate Zoom access for Class Plaintiffs. Apple, however, responded to Class Plaintiffs’ surprise that it would not agree to the proposal because Class Plaintiffs are not parties to the *Epic* case, and, therefore, “have no greater right to access to this trial than does any other member of the public.” Byrd Decl., ¶ 5.

III. CLASS PLAINTIFFS SHOULD BE PERMITTED TO VIEW THE TRIAL OVER ZOOM

Apple’s insistence that because Class Plaintiffs are not “parties” to the *Epic* case they are members of the public and are limited to listening to the trial over a conference line is meritless. There is, of course, a third category into which Class Plaintiffs fall: they are parties to related cases that have been intimately involved in discovery and Zoom court proceedings together with Epic and Apple for months, and the conduct of the *Epic* trial, including the presentation of evidence and the creditability of witnesses, is highly relevant to Class Plaintiffs’ cases, including their motions for class certification due on June 1, 2021.

The only possible motive Apple has for attempting to limit Class Plaintiffs to listening to the

1 audio version of the trial is to gain an unfair advantage over Class Plaintiffs. Apple is a party in *Epic*,
 2 such that its trial team will be present at the trial and also viewing the trial over Zoom. Class Plaintiffs
 3 should be on the same playing field as Apple and also be able to view the trial over Zoom.

4 There are no technological impediments to allowing Class Plaintiffs to view the trial over the
 5 Zoom platform, since the parties to the *Epic* case are selecting a third-party vendor who will facilitate
 6 viewing of the trial over Zoom for the parties, witnesses and Court staff. If allowed by the Court, per
 7 their request, Class Plaintiffs can very easily log in to view the trial using the same credentials.

8 **IV. CONCLUSION**

9 Class Plaintiffs request the Court enter an order permitting them to view the *Epic* trial.
 10 including all its proceedings, over the Zoom platform. In the alternative, Class Plaintiffs request
 11 guaranteed daily access to trial proceedings via the audio conference line referenced by the Court in
 12 the *Epic v. Apple* status conference of March 26, 2021, or their own dedicated audio conference line
 13 for that purpose if, for example, there is a limit to the number of people who can listen on the public
 14 conference line.

15
 16 DATED: April 12, 2021

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DECLARATION REGARDING CONCURRENCE

I, Rachele R. Byrd, am the ECF user whose identification and password are being used to file this **CLASS PLAINTIFFS' ADMINISTRATIVE MOTION FOR PERMISSION TO VIEW TRIAL VIA ZOOM**. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that all of the signatories listed above have concurred in this filing.

DATED: April 12, 2021

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP

/s/ Rachele R. Byrd

RACHELE R. BYRD